involves the conception of a business, — an entity, in a mercantile sense at least, separate and distinct from the individual affairs of the members.[13] Such an entity cannot be created by the doing of a single act.[14] It is the performance of a series of acts, all done for the same ultimate purpose of profit under the joint agreement so as to be bound together into a unit, that underlies the conception in the minds of mercantile men of an entity quite distinct from their individual affairs; and this entity the law recognizes to a certain extent and to it attaches certain incidents. But if the joint agreement is such that it does not contemplate the creation of such an entity, there is no need of turning to the complex law of partnership for a guide, but each problem arising thereunder can be solved by the ordinary law of contracts.

This distinguishing feature is consistent with incidental differences which the cases recognize. Mutual agency of partners is an established necessary incident of a partnership, though it may be restricted *inter se*. It is a sensible rule which gives the creators of an entity equal authority to act for it.[15] In a joint adventure, however, there is no question as to the relation of several individuals to a distinct entity, but merely of the relation of several individuals *inter se;* and obviously, to find that one is agent of the other, we should find that authority so to act was given by that other by agreement, express or implied.[16] So also on the insolvency of partners, by the law of partnership, firm creditors have priority over the separate creditors as to the firm property.[17] But the insolvency of joint adventurers should not give the creditors of the joint debtors any priority over their separate creditors to the joint property since the credit has not been extended to, or enriched, a distinct entity, but the individuals alone.

OBLIGATION OF AGGRIEVED CONTRACTING PARTY TO ACCEPT NEW OFFER OF DEFAULTER TO OBVIATE AVOIDABLE DAMAGE. — The funda-

[13] See BURDICK, PARTNERSHIP, 3 ed., 21–25.

[14] Compare cases holding that the doing of a single act within a state is not "transacting or carrying on business within the state." Penn. Collieries Co. *v.* McKeever, 183 N. Y. 98, 75 N. E. 935 (1905); Ammons *v.* Brunswick-Balke-Collender Co., 141 Fed. 570 (1905); Kirven *v.* Va.-Car. Chemical Co., 145 Fed. 288 (1906); Allegheny Co. *v.* Allen, 69 N. J. L. 270, 55 Atl. 724 (1903); State *v.* Robb-Lawrence Co., 15 No. Dak. 55, 106 N. W. 406; Keene Guaranty Sav. Bank *v.* Lawrence, 32 Wash. 572, 73 Pac. 680 (1903). See 5 THOMPSON, CORPORATIONS, 2 ed., § 6674.

The same thought is found in cases in which it is held that credits acquired in the course of business of lending are taxable as business stock having a *situs* at the place of business, though intangible credits can have no actual *situs*. The series of credits is regarded as creating an entity, the stock in trade. Metropolitan Life Insurance Co. *v.* New Orleans, 205 U. S. 395 (1907); Adams *v.* Colonial & U. S. Mortgage Co., 82 Miss. 263, 34 So. 482 (1903). See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 609–613.

[15] Under the legal-person theory of a partnership, each is agent for the legal person, the firm. See the remarks of Jessel, M. R., Pooley *v.* Driver, *supra*, note 8, at page 476. Under the aggregate theory, each acts for the individuals composing the firm. Cox *v.* Hickman, 8 H. L. Cas. 268 (1860).

[16] Strohschein *v.* Kranich, 157 Mich. 335, 122 N. W. 178 (1909); Smith *v.* First Nat'l Bank of Albany, 151 App. Div. 317, 135 N. Y. Supp. 985 (1912); Jones *v.* Gould, 123 App. Div. 236, 108 N. Y. Supp. 31 (1908).

[17] See 1 ROWLEY, MODERN LAW OF PARTNERSHIP, § 535 and note.

mental principle of indemnification which underlies the law of damages is qualified by a second, which imposes on the injured party the burden of taking all reasonable steps to mitigate whatever loss is likely to result from the wrong and which refuses to regard that which he might reasonably have avoided as damage flowing from the injury.[1] Hence, whether the injured party has or has not forestalled injurious consequences of this nature his recovery is limited to the expense incurred or which would have been incurred in avoiding them.[2] Does the principle of avoidable consequences demand that we treat a new offer to perform, coming from a party guilty of a substantial breach of contract, on a par with offers of third parties?

Often when the party guilty of a breach makes a new offer he intends an accord and satisfaction. If the offer discloses such to be its purpose the aggrieved party need not accept it, since to do so would rob him of his legitimate contract rights.[3] Some courts go further and say that the acceptance of a new offer, even though nothing is said as to the old contract, might subject the plaintiff to the risk of being considered to have abandoned his claim to damages.[4] This is not sound law.[5] No accord should be presumed in the absence of an agreement to that effect, which can fairly be inferred from the words used or from the circumstances.[6] The wronged person by accepting the defaulter's offer merely does what the law insists he do to avoid detrimental consequences of the breach.[7]

Obviously the aggrieved party need not accept the new offer if he is in no position to comply with its terms.[8] The same would be true should it necessitate a departure from his ordinary course of business.[9] It has been held that an employee might refuse another offer from a contractor

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[1] Hall *v.* Paine, 224 Mass. 62, 112 N. E. 153 (1916); Beymer *v.* McBride, 37 Iowa, 114 (1875); Clark *v.* Marsiglia, 1 Denio (N. Y.), 317 (1845). See Brace *v.* Calder, [1895] L. R. 2 Q. B. D. 253, 261; Dunkirk Colliery Co. *v.* Lever, [1878] 9 Ch. D. 20, 25; Frost *v.* Knight, [1872] L. R. 7 Ex. 111, 115.

[2] Western Union Tel. Co. *v.* Southwick, 214 S. W. 987 (1919 Tex. Civ. App.); Collins *v.* Twin Falls Co., 28 Idaho, 1, 152 Pac. 200 (1915); Erie County Natural Gas & Fuel Co. *v.* Carrol, 1911 A. C. 105; Benton *v.* Fay, 64 Ill. 417 (1872). See Beymer *v.* McBride, *supra*, 118. "The principle is that if the party does not perform his contract the other may do so for him, as near as may be, and charge him for the expenses incurred in so doing." Hamblin *v.* Great Northern Ry. Co., 26 L. J. (Ex.) 20, 23 (1856).

[3] Campfield *v.* Sauer, 189 Fed. 576 (1911); People's Cooperative Ass'n *v.* Lloyd, 77 Ala. 387 (1884); Jackson *v.* Independent School District, etc., 110 Iowa, 313, 77 N. W. 860, 863 (1899); Whitemarsh *v.* Littlefield, 46 Hun (N. Y.), 418 (1888); Hirsch *v.* Georgia Iron & Coal Co., 169 Fed. 578 (1909).

[4] Waldrip *v.* Hill, 70 Wash. 187, 126 Pac. 409 (1912); Chisholm *v.* Preferred Bankers, etc. Co., 112 Mich. 50, 56, 70 N. W. 415, 417 (1897); People's Cooperative Ass'n *v.* Lloyd, *supra;* Havemeyer *v.* Cunningham, 35 Barb. (N. Y.) 515 (1862).

[5] Phillips *v.* Todd, 180 S. W. 1039 (Mo. 1915); Garfield Co. *v.* Railway, 166 Mass. 119, 44 N. E. 119 (1986); Lawrence *v.* Porter, 63 Fed. 62, 65 (1894); Warren *v.* Stoddart, 105 U. S. 224 (1881); McKnight *v.* Dunlap, 5 N. Y. 537 (1851).

[6] Smith *v.* Carter & Co., 136 Mo. App. 529, 118 S. W. 527 (1909).

[7] *Ibid.*

[8] Lawrence *v.* Porter, *supra*, 64; Cook Manufacturing Co. *v.* Randall, 62 Iowa, 244, 249, 250, 17 N. W. 507, 510 (1883).

[9] Waldrip *v.* Hill, 70 Wash. 187, 126 Pac. 409 (1912); Brazell *v.* Cohn, 32 Mont. 556, 81 Pac. 339, 343 (1905); Dunkirk Colliery Co. *v.* Lever, 9 Ch. D. 20, 25 (1878).

guilty of reprehensible conduct,[10] and it is reasonable to suppose that in such case a like result would obtain in mercantile contracts.

In cases involving employment contracts a refusal by a wrongfully discharged employee to accept an offer of his former employer to re-engage him may be introduced in reduction of damages.[11] But the offer will not be considered if it substantially varies the terms of employment,[12] if the offered services are more menial,[13] if anything has occurred to render further association between the parties offensive or degrading,[14] or if the employee has in the interval obtained a position elsewhere.[15]

It sometimes happens where a mercantile contract has been broken that the party breaking it makes a new offer whose terms are more advantageous than those of the market generally, or else he is the only one capable of supplying the subject matter of the original agreement. A recent English case, *Payzu, Ltd.* v. *Saunders*,[16] in accord with the better view in the United States,[17] applies the analogy of employment contracts and holds that the rejection of the offer, provided its acceptance would not entail substantial inconvenience, disentitles the plaintiff from recovering the loss he might reasonably have avoided by accepting it. His damages are limited to the additional expense he would have incurred had he accepted it.[18] Slight weight should attach to the element of personal pique and to the fact that the opportunity to lessen the plaintiff's loss comes at the hands of one who has been guilty of a breach.[19] The aim, in treating his offer like any other on the market,

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[10] Levin *v.* Standard Fashion Co., 16 Daly (N. Y.) 404 (1890).

[11] Brace *v.* Calder, *supra;* Bigelow *v.* The American Forcite Powder Mfg. Co., 39 Hun (N. Y.), 599 (1886); Birdsong *v.* Ellis, 62 Miss. 418 (1884); Mitchell *v.* Toole, 25 S. C. 238 (1886).

[12] Jackson *v.* Independent School District, etc., 110 Iowa, 313, 77 N. W. 860 (1899). See Birdsong *v.* Ellis, *supra*, 420.

[13] Cooper *v.* Strange & Warner Co., 111 Minn. 177, 126 N. W. 541 (1910) (manager of department to saleslady).

[14] Levin *v.* Standard Fashion Co., *supra.*

[15] Birdsong *v.* Ellis, *supra*, 420.

[16] [1919] 2 K. B. 581. See RECENT CASES, *infra*, p. 863. It is possible that in the United States a different result might have been reached on the question whether the defendant was guilty of a breach. The English court, while referring to Sec. 31, SALE OF GOODS ACT, which is substantially like Sec. 45 (2) of our SALES ACT, takes pains expressly to reaffirm the rule concerning divisible contracts as laid down by Lord Coleridge in Freeth *v.* Burr, [1874] L. R. 9 C. P. 208. This rule stresses the intent to abide by the contract as the all-important factor. The great weight of authority in the United States following Norrington *v.* Wright, 115 U. S. 189 (1885), considers the materiality of the failure of performance as the telling element. See WILLISTON'S WALD'S POLLOCK ON CONTRACTS, 3 ed., 327.

[17] Borden & Co. *v.* Vinegar Bend Lumber Co., 7 Ala. App. 335, 62 So. 245 (1913); Lawrence *v.* Porter, *supra;* Warren *v.* Stoddart, *supra;* Deere *v.* Lewis, 51 Ill. 254 (1869).

[18] The American cases err in limiting the plaintiff's damages to the interest on the credit period where he is wrongfully denied credit to which his contract entitles him. To a business man the use of the capital during the credit period is worth considerably more than the current interest rate. Else, he would not borrow for investment. This fact is recognized in Payzu, Ltd. *v.* Saunders, [1919] 2 K. B. 581.

[19] Parsons *v.* Sutler, 66 N. Y. 92 (1876); McCurdie, J., in Payzu, Ltd. *v.* Saunders, *supra*, 586: "I feel no inclination to allow in a mercantile dispute an unhappy indulgence in far-fetched resentment or an undue sensitiveness to slights or unfortunately worded letters. Business often gives rise to certain asperities." See *Ibid.*, 589; Lawrence *v.* Porter, *supra*, 66.

is to prevent the imposition of forfeitures and penalties.[20] The aggrieved party may refuse the offer which would mitigate his loss, but if he does that he pursues a course not necessary to his own protection and must bear the consequences.

Several cases are apparently in conflict with the above view;[21] but of these only two seem to be irreconcilable.[22] The others can be explained on the ground that the plaintiff was in no position to accept the new offer; that the offer called for a surrender of rights under the old contract; or that it involved a radical departure from the terms of the old agreement.[23] It is argued that the defaulter can not call upon the wronged party to make a new contract for his benefit; that to deny the plaintiff damages for loss he might have avoided by accepting the defendants' new offer would encourage bad faith. But the acceptance of the new offer does not work to the defendant's advantage,[24] except in so far as the damage which might result from his breach is thereby held down to a smaller compass. And if there be any weight in these objections, they apply with equal force to the whole doctrine of mitigation of damages, which is fundamental in the common law.

RECENT CASES

ABATEMENT — PENDENCY OF AN ACTION IN WHICH PRESENT CLAIM MIGHT BE SET UP AS COUNTERCLAIM. — In an action for damages caused by a collision between the plaintiff's and the defendant's motor trucks, the defendant pleaded in abatement the pendency of an action by the defendant against the plaintiff for damages caused by the same collision. *Held*, that the action be dismissed. *Allen* v. *Salley*, 101 S. E. 545 (N. C.).

When a pending action will settle all issues between the parties, its pendency is ground for abatement of a subsequent action. *Stevens* v. *Home Savings Ass'n*, 5 Idaho, 741, 51 Pac. 779; *Disbrow Mfg. Co.* v. *Creamery Mfg. Co.*, 115 Minn. 434, 132 N. W. 913. But when the pending action will not in itself determine all issues, the defendant is generally allowed to elect whether to plead a cross demand by way of counterclaim or to bring a separate action on it. *Welch* v. *Hazelton*, 14 How. Pr. 97; *Douglas Co.* v. *Moler*, 3 Misc. 373, 22 N. Y. Supp. 1045. See 1 SUTHERLAND, DAMAGES, 4 ed., § 187. The principal case compels the defendant to use his remedy of counterclaim. The

[20] "To excuse the injured party from dealing with the party in default would enable the injured party to adopt a course possibly dictated by a desire to injure another rather than to save himself." See Borden & Co. *v.* Vinegar Bend Lumber Co., 7 Ala. App. 335, 62 So. 245, 248 (1913). See J. H. Beale, Jr., "Damages upon Repudiation of a Contract," 17 YALE L. JOUR. 444.

[21] Frohlich *v.* Independent Glass Co., 144 Mich. 278, 107 N. W. 889 (1906); Cox *v.* Anoka Waterworks, etc. Co., 87 Minn. 56, 91 N. W. 265 (1902); Coppola *v.* Marden Orth & Hastings Co., 282 Ill. 281, 118 N. E. 499 (1917); Cook Manufacturing Co. *v.* Randall, 62 Iowa, 244, 17 N. W. 507 (1883).

[22] Cox *v.* Anoka Waterworks, etc. Co., *supra* (but thirty days had elapsed between the breach and the new offer); Frohlich *v.* Independent Glass Co., *supra*.

[23] See Cook Manufacturing Co. *v.* Randall, 62 Iowa, 244, 250, 17 N. W. 507, 510; Coppola *v.* Marden, etc. Co., 282 Ill. 281, 284, 118 N. E. 499, 500.

[24] Suppose A refuses to deliver on credit per agreement and he later offers to deliver for cash. If B pays him cash he gets the very thing he wanted and has his cause of action for the added expense involved, — in this case the loss of the value of the credit period. What does A gain thereby?